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No. 91-1104

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM DALE KEGLEY AND
LAURIE JANE LUTTRELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause requires that the government have "reasoned grounds" to believe that a person has engaged or will engage in criminal activity before the government may initiate a criminal investigation of that person.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc, Pet. App. C1-C6, is reported at 923 F.2d 764. The panel opinion of the court of appeals, Pet. App. A1-A33, is reported at 889 F.2d 806.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 23, 1991. The petition for a writ of certiorari was filed on August 8, 1991, and is accordingly out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners were convicted of conspiring to possess and traffic in unauthorized and counterfeit credit card drafts, in violation of 18 U.S.C. 1029(a)(1)-(3), and attempting to traffic in counterfeit drafts, in violation of 18 U.S.C. 1029(a)(1) and (b)(1). They were sentenced to probation. A panel of the court of appeals reversed their convictions, but on rehearing the en banc court of appeals affirmed.

1. In 1980, petitioner Kegley operated a telemarketing business named the Complimentary Vacation Club, which offered vacation packages at discount prices. Kegley received payment for the vacation packages through credit card drafts that customers authorized to purchase the packages. He opened an account with the Bank of America of Taiwan, where he deposited the drafts. The bank later canceled his account and returned the drafts, which he retained. Pet. App. A4-A5; Pet. 8.

The Secret Service subsequently set up a fictitious business named Aloha Imports to investigate illegal activities in telemarketing. The Service hired Richard Barker, who was awaiting sentencing on a conviction for credit card fraud, to solicit prospective clients for illegal credit card draft transactions. Barker had previously conducted telemarketing transactions with Kegley and offered to help Kegley factor his credit card drafts. Pet. App. A5-A6; Pet. 9.[1]

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[1] "Factoring" describes a practice in which a merchant who does not have a valid credit card account with a bank sells the drafts at a discount to a merchant who does have such an account. The authorized merchant deposits the drafts and receives payment from the bank. Factoring authorized credit card drafts is not necessarily illegal, but it may violate the

On March 12, 1987, an undercover agent at Aloha Imports, using the name David Young, called Kegley to discuss the possibility of processing credit card drafts. Kegley said that he had quite a few drafts that were "a little bit old." He also said that some of the drafts were invalid. Young replied that he could process the drafts, and he suggested that they meet the next day to negotiate the division of the proceeds. Pet. App. A6-A7.

Kegley brought petitioner Luttrell to the meeting with Young. Kegley introduced Luttrell as his business associate. Luttrell took notes during the meeting, which the Secret Service recorded and videotaped. Young and Kegley discussed how the factoring scheme would work. Young represented that he owned a company in Honolulu and that he could deposit the drafts in Southeast Asia through connections that he had there. Pet. App. A7.

Kegley agreed that his merchant imprint should be removed from the drafts, and he did not object when Young proposed changing the amounts on the drafts so that Kegley and Young could receive a greater return. Young told Kegley that the drafts would be deposited into a merchant's account and that the money would be wired to Young's account within 24 hours thereafter. Young announced that in three days he would fly to Honolulu and then to Singapore to factor the drafts. Kegley was hesitant and acknowledged the illegality of the scheme. Nevertheless, petitioners agreed to participate. They arranged for Luttrell to collect the money from the transaction. At the end of the meeting, petitioners

merchant's contract with the bank. Pet. App. A6 n.3. Factoring unauthorized credit card drafts is illegal. *Ibid.* See 18 U.S.C. 1029.

gave Young nearly $1 million in credit card drafts. Pet. App. A8.

On the morning that Young was to fly to Singapore, Kegley called Aloha Imports, and an undercover agent answered. After asking questions about Young and Aloha Imports, Kegley told the agent that he wanted to cancel the transaction. Kegley also sent a Mailgram to that effect. The agent informed Young, who called Kegley and pretended to be in Singapore. Kegley told Young that he did not want anything to do with the operation and that Young should keep Kegley's share of the proceeds. Young replied that it was too late, that the drafts had already been processed, and that Kegley's share was $800,000. Kegley told Young to keep the money. Pet. App. A8-A9.

2. Petitioners moved the district court to dismiss the indictment on the ground that the government's investigative methods in this case constituted outrageous government conduct, but the district court denied the motion. Pet. App. A18, A31. The court did, however, instruct the jury on the defense of entrapment. The jury rejected that defense and convicted petitioners. *Id.* at A9-A10.

3. A panel of the court of appeals accepted petitioners' claim of outrageous government conduct, holding that "police officers violate constitutional norms when, without reasoned grounds, they approach apparently innocent individuals and provide them with a specific opportunity to engage in criminal conduct." Pet. App. A26-A27.[2] In the panel's view, there was "absolutely no evidence on the trial record that the Secret Service possessed any information linking

[2] Petitioners appealed their convictions on several other grounds, which the panel rejected. Pet. App. A10-A24, A32. Petitioners do not renew those contentions in this Court.

[petitioners] or their business with illegal activity." *Id.* at A25. Nor, the panel observed, was there "any testimony on the record that the police were aware of criminal activity involving unknown members of a discrete class or group of which [petitioners] might be a part." *Ibid.*

The panel acknowledged the importance of using undercover agents in the investigation of "ongoing activities" and stated that it was "generally reluctant to disagree with the government on matters of law enforcement policy." Pet. App. A29. The panel nevertheless found the governmental interest in conducting "suspicionless" investigations to be "weak at best." *Ibid.* The panel characterized such investigations as "inefficient" and "arbitrary," and it cited the use of informants—who, it observed, "do[] not always obey the niceties of police protocol"—as deserving of special scrutiny. *Id.* at A30.

The court noted, however, that "[t]he trial record contains hints that the Secret Service may in fact have had a factual basis for targeting" petitioners, and it therefore remanded the case to the district court to "determine whether the government had reasoned grounds for approaching [petitioners] and offering them the opportunity to participate in a criminal scheme." Pet. App. A31-A32.

4. The court granted the government's suggestion of rehearing en banc and vacated that portion of the panel's judgment requiring the government to have "reasoned grounds" to believe that a person has engaged or will engage in criminal activity before the government may initiate a criminal investigation of that person. Pet. App. C2-C3. In "explicitly rejecting" that requirement, the court explained that it was "follow[ing] four of our sister circuits"—namely, the Second, Third, Tenth, and District of Columbia Circuits. *Id.* at C3.

Judge Pregerson dissented. He agreed with the panel's analysis of petitioners' outrageous government conduct claim. Pet. App. C4. While acknowledging that in the instant case there was "no indication that the police acted out of any personal animus against the defendants or that the police randomly and arbitrarily targeted [them]," Judge Pregerson thought that the police "should not be allowed to hire informants simply to go out on fishing expeditions to find targets for undercover sting operations." *Id.* at C5. Like the panel, Judge Pregerson would have remanded the case to the district court for findings as to whether the government, before it contacted petitioners, had reason to believe that they "were likely to engage in criminal activities." *Id.* at C5-C6.

ARGUMENT

Petitioners argue that their convictions must be set aside because the government lacked "reasoned grounds" to believe at the outset of its investigation that petitioners had been or would be involved in criminal activity. Pet. 12-17. Contrary to petitioners' claim, no such "reasoned grounds" are required.

The courts of appeals are in agreement that the Due Process Clause does not impose a requirement on the government that it must have "reasoned grounds" or reasonable suspicion that a person has committed or will commit an offense before it may commence an investigation of that person. *United States* v. *Allibhai*, 939 F.2d 244, 248-249 (5th Cir. 1991), cert. denied, No. 91-751 (Jan. 27, 1992); *United States* v. *Osborne*, 935 F.2d 32, 35-36 (4th Cir. 1991); *United States* v. *Chin*, 934 F.2d 393, 396-398 (2d Cir. 1991); *United States* v. *Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (en banc), cert. granted on other grounds, 111 S. Ct. 1618 (1991) (No. 90-1124); *United States* v.

Miller, 891 F.2d 1265, 1269 (7th Cir. 1989); *United States* v. *Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988); *United States* v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Thoma*, 726 F.2d 1191, 1198 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); *United States* v. *Jannotti*, 673 F.2d 578, 609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 940-941 (2d Cir.), cert. denied, 449 U.S. 956 (1980).[3]

There is no merit to petitioners' argument that the government must have reasonable suspicion before it may investigate a person. Although the government's investigations are normally motivated by suspicion of illegal conduct, a person "has no constitutional right to be free of investigation." *United States* v. *Jacobson*, 916 F.2d at 469. Thus, when "the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have commenced without probable cause does not bar the conviction of those who rise to its bait." *United States* v. *Driscoll*, 852 F.2d at 87 (quoting *Jannotti*, 673 F.2d at 609).

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[3] Petitioners contend that the reasonable suspicion question presented by their certiorari petition is "identical" to the issue before this Court in *Jacobson* v. *United States*, No. 90-1124, and thus "may properly be addressed and resolved at the same time." Pet. 16-17. Petitioners are incorrect. In *Jacobson*, this Court limited its grant of certiorari to the question whether petitioner was entrapped as a matter of law. Petitioner and amici in *Jacobson* discussed the reasonable suspicion question presented by the certiorari petition in this case, and we responded to those arguments, but only after pointing out that the issue was not properly before the Court. Because the Court did not grant review in *Jacobson* to decide the reasonable suspicion question, this Court need not hold the petition in this case pending the Court's decision in *Jacobson*.

This Court has never held, or even suggested, that government initiation of an investigation without prior suspicion of wrongdoing violates due process.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] This Court noted in *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." The Court held, however, that no such due process violation was shown in that case. The Court has never found an investigative technique to be so offensive as to violate due process and to prohibit the government from prosecuting the defendant, in spite of several invitations to do so. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980).

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